

Questions on notice

Senator Fierravanti-Wells asked two questions on notice, namely:

1. Could each of the organisations provide to the committee actual formal complaints where the religious exemptions have been involved or invoked, whether in relation to students, staff or contractors?
2. Given the recognition of religious freedom under international law, could you give me your views as to why that right shouldn't sit alongside other human rights with appropriate protections?

My response here relates only to the views of Liberty Victoria, though the question was posed to all the organizations before the Committee at the time.

## Question 1

From this question it appears the Senator may not fully grasp the inherent problem in the “religious exemptions”. There is no possibility of a “formal complaint” under a law that simply does not apply.

Liberty Victoria is not an ordinary destination for people’s individual grievances, which if the law was corrected might be able to become formal complaints, and we have no examples of such grievances to supply, other than the many public reports, especially in the context of the marriage postal survey, which other organizations are in a better place to comment on.

From my time as a Member of the Victorian Equal Opportunity and Human Rights Commission (2000–2009) I can note that the Victorian Independent Education Union informed me of many anecdotal complaints they received about religious schools discriminating against lesbian or gay male teachers, none of which could become formal complaints under the Victorian Equal Opportunity Act then, which had and has failings almost identical to those of the Sex Discrimination Act today. The Union was usually able to negotiate better outcomes for its members than the summary dismissal that might otherwise have occurred. I was told, however, that the major role of the religious exemptions was to give religious schools a “sword of Damocles” hanging over gay staff members' heads. The chilling effect of this knowledge of ever present vulnerability on so many teachers over so many years was and is hugely damaging, both to the many teachers suffering it and to the children whose education was consequently limited and constrained.

## Question 2

I believe that Liberty’s submission to the Ruddock Review made on 14 February 2018 contains a thorough response to this question and the mistaken assumption underlying it.

As noted in the opening paragraph of my evidence on Monday, we wish to incorporate that submission for the Inquiry’s consideration, and I now attach it here.

I apologise that I was unable to meet yesterday's deadline, owing to other pressures in this final week of the State election, and trust that my response, and the incorporated submission, can still be of help to the Inquiry.



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14 February 2018

The Expert Panel on Religious Freedom  
C/O Department of the Prime Minister and Cabinet  
PO Box 6500, Canberra ACT 2600, Australia

Email: religiousfreedom@pmc.gov.au

Dear Mr Ruddock and Panel,

### **Submission on the Religious Freedom Review**

Liberty Victoria is grateful for the opportunity to make this submission

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. We seek to promote Australia's compliance with the rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).

This is a public submission, not confidential. It may be quoted in your report and be published online. We hope for the opportunity to participate in a public hearing,

Yours faithfully,

(signed)

Jessie Taylor

President, Liberty Victoria

(signed)

Jamie Gardiner

Vice President, Liberty Victoria

## 1 **Recommendations**

- 1 Freedom of religion is properly understood to mean the freedom for an individual to have, or not have, a religious belief, to join a religion and take part in its rites and rituals, or change religion, or leave a religion, and not to be discriminated against because of their having or not having a religion; and also the right of religions—taken to mean (more or less) organized groups of persons adhering to a common belief system—to coexist in society on a basis of equality with each other and with individuals or groups of no religion.
- 2 Freedom of religion in Australia, properly understood, is not in need of further protection beyond what might be afforded by the enactment of a Commonwealth Charter of Human Rights and Responsibilities implementing the obligations Australia has accepted by ratifying international human rights treaties including the ICCPR, ICESCR and CRC.
- 3 The many privileges that religions in Australia enjoy are incompatible with the principle of equality that underlies the freedom of religion and belief, and indeed adversely affect the human rights and freedoms of others, and being unjustifiable they should be revoked. In particular, the actions required include:
  - a. Remove “religious exemptions” from Commonwealth, State and Territory laws, including the *Sex Discrimination Act 1984*, the *Fair Work Act 2009* and the *Age Discrimination Act 2004*, except for provisions necessary to comply with s.116 of the *Constitution*; or, if necessary as an interim measure, make the operation of any remaining religious exemptions open and transparent (as outlined in this submission);
  - b. Repeal the provisions of the *Charities Act 2013* and the *Australian Charities and Not-for-profits Commission Act 2012* that treat the “advancement of religion” as inherently charitable, and abolish any related rule of the common law;
  - c. End all exemptions from Commonwealth, State, Territory and municipal taxes, rates and duties allowed to religious bodies, including preferential reductions, other than those generally available in relation to services of benefit to the community at large;
  - d. End the school chaplains program and reallocate the funds to the provision of professional psychological and counselling support to students and teachers according to need;
  - e. End the practice of allowing “Special Religious Instruction” by agents of particular religions in public schools which receive any form of Commonwealth funding, direct or indirect, and ensure that if a school includes religious materials in its teaching it is done only by qualified teachers and fairly includes non-partisan reference to the many religions in or relevant to Australia, including the existence of non-religious ways of being;
  - f. Abolish the offence of blasphemy, and any associated rules of the common law;

- g. Conduct a careful inquiry into any other law or practice that is inconsistent with the letter or spirit of s.116 of the *Constitution* and must therefore be changed or discontinued, amended or repealed.

## 2 Introduction

The Terms of Reference of this Review consist of an Objective and three brief items describing its Scope.

### 2.1 Objective

#### **OBJECTIVE**

The Panel shall examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

2.1.1 The Objective rather begs the question, by appearing to foreclose discussion of even the possibility that Australian law is *overly* protective of “the human right to freedom of religion.” For it is clear that what current public discourse appears to mean by the term “religious freedom” is, instead, unjustified religious privilege and overweening power, rather than the traditional meaning.

2.1.2 That meaning holds that there can be no “established religion,” the government may not favour adherents of one religion or denomination over others or none and barriers to official and other employment for people of one faith or another are removed: in other words, none of the sectarianism that plagued many areas of Australian society until the 1960s or even later.

### 2.2 Scope

#### **SCOPE**

In undertaking this Review, the Panel should:

- Consider the intersections between the enjoyment of the freedom of religion and other human rights.
- Have regard to any previous or ongoing reviews or inquiries that it considers relevant.
- Consult as widely as it considers necessary.

2.2.1 As paragraph two of the Scope observes, and directs this Review towards, there are two “previous or ongoing” inquiries at least. The first is the Australian Law Reform Commission’s 2015 Report 129, *Traditional Rights and Freedoms*, whose Chapter 5 examines the freedom of religion and concludes<sup>1</sup> that there is “no obvious evidence that Commonwealth anti-discrimination laws encroach on freedom of religion.” Significantly, however, it adds this is “especially given the existing exemptions for religious organisations,” which may hint at the significant overreach of such exemptions.

2.2.2 The other is being conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade into “the status of the freedom of religion or belief (as recognised in Article 18 of the *International Covenant on Civil and Political Rights*)

<sup>1</sup> Australian Law Reform Commission, 2015, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* Report 129, Paragraph 5.154, page 159

around the world, including in Australia.” Chapter 7 of the committee’s Interim Report<sup>2</sup> sets out in some detail the conflicting evidence on the tension between the right to equality and non-discrimination and the freedom of religion.

2.2.3 The submission that Liberty Victoria made<sup>3</sup> to that Committee in June 2017 analyses “the intersections between the enjoyment of the freedom of religion and other human rights” (paragraph one of the Scope) in some detail, and is attached to this submission as an integral Appendix.

## 2.3 Context of the Review

2.3.1 The particular context of this Review is a political manoeuvre in response to the overwhelming public YES vote in the marriage equality postal survey and the intricacies of navigating a reform bill through the Parliament. This in turn was seen as necessary because of the misconception—avidly promoted throughout the years leading up to that reform bill—that marriage equality impinged on religious freedom.<sup>4</sup>

2.3.2 At its narrowest, this assertion concerned an erroneous, and almost certainly bad faith, misinterpretation of the *Marriage Act*’s “protection” of religious celebrants’ freedom to choose whom they marry (and under what conditions). Consistent with the *Constitution*’s s.116 prohibition on “imposing any religious observance, or... prohibiting the free exercise of any religion,” the *Marriage Act* 1961, by s.47, made it clear that ministers of religion authorized to solemnize marriages had *carte blanche* as to religious matters such as whom they could admit to the marriage liturgy of their religion.<sup>5</sup> The scare campaign about such ministers being forced to marry couples whom their religion barred from marriage was always a furphy.<sup>6</sup> Its constant propagation by religious figures who (or whose legal advisers) certainly knew better, was dishonest, indeed disgraceful. The ignorance or complicity of the media, who seldom called it out, compounded its deliberate misleading of the public.

2.3.3 As Professors Johnson and Maddox point out, however, the claim that marriage equality would impinge on religious freedom was much more expansive, if equally bogus. Johnson and Maddox note that, “given increasing public support for same-sex marriage, including among religious adherents, [conservative religious organisations] often argue that same-sex marriage is really about broader issues, such as gender roles and parenting.” They continue:

A key argument – espoused recently by Tony Abbott – is that same-sex marriage will threaten “religious freedom”. Such arguments, often based on a small number of yet-to-be-finalised overseas cases, or a Tasmanian complaint that was later withdrawn,

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<sup>2</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, 30/11/2017, *Legal Foundations of Religious Freedom in Australia*

<sup>3</sup> Inquiry into the status of the human right to freedom of religion or belief, Submission 227

<sup>4</sup> Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)

<sup>5</sup> Except, of course, religious bodies such as the Religious Society of Friends—the Quakers—whose wish and freedom to marry couples regardless of the sex of the parties was (perhaps unconstitutionally) stomped upon by the 2004 amendment.

<sup>6</sup> Refusal to marry couples where one party or both were previously divorced, for example, was routine for Roman Catholics, for example; refusal of marriage rites to mixed denomination or faith couples was also routine; and no doubt, given the variety of religious beliefs, there were a variety of other religious marriage bars. Unsurprisingly the proportion of marriages by religious celebrants has been steadily shrinking for decades, and is now below 25%: Australian Bureau of Statistics 28/11/2017 3310.0 - *Marriages and Divorces, Australia, 2016*.

effectively reframe the debate away from discrimination against those in same-sex relationships.

Consequently, conservative Christians now depict themselves as potential victims of discrimination. This is despite the long history of past discrimination against gays and lesbians, including criminalisation of male homosexuality and the ineligibility of same-sex couples for many federal government entitlements. Such reframings have proved an effective political tactic in the US.<sup>7</sup>

2.3.4 The reference to US political tactics is telling. The reframing of freedom of religion and belief—a quintessentially equal, non-discriminatory norm—as “religious freedoms” is a deliberate tactic of the US religious right, as Jay Michaelson has demonstrated in his 2013 report *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*<sup>8</sup>.

2.3.5 The careless adoption of the US “religious freedoms” reframing should be called out for what it is, namely a covert US campaign tactic<sup>9</sup> imported by bodies such as the ACL. Its lazy use by Australian media, and some politicians, is to be deplored.

### **3 Freedom of Religion is adequately protected**

#### **3.1 Constitutional and Statutory protection**

3.1.1 Australia is a secular democracy. It is not a theocracy. It does not have an “established religion.” Indeed, the Constitution expressly forbids making any law to establish a religion: s.116.<sup>10</sup>

3.1.2 Australia does have freedom of religion. At the Commonwealth level this is constitutional. It means that individuals may belong to any religion of their choosing, or none. They may change religion, or adopt no religion. They may worship, individually or with others, and observe religious rites. No religion is to be given advantages over other religions. Religious bodies and individuals must, however, obey laws of general application.<sup>11</sup>

3.1.3 As s.116 of the *Constitution* does not bind the States, it remains possible for State laws to impinge on freedom of religion or belief. Most jurisdictions protect against discrimination on the basis of religious belief in the usual areas: employment and so on. The Commonwealth does not.

3.1.4 The best way to ensure that individuals were not discriminated against because of their beliefs would be to enact a comprehensive *Charter* or *Human Rights*

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<sup>7</sup> Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)

<sup>8</sup> *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*, Jay Michaelson, 2013 [http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA\\_Redefining-Religious-Liberty\\_March2013\\_PUBLISH.pdf](http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA_Redefining-Religious-Liberty_March2013_PUBLISH.pdf) accessed 20180109

<sup>9</sup> See also: *When Exemption is the Rule: The Religious Freedom Strategy of the Christian Right*, Frederick Clarkson, 12 January 2016 <http://www.politicalresearch.org/2016/01/12/when-exemption-is-the-rule-the-religious-freedom-strategy-of-the-christian-right/#sthash.e2jLQsKw.XfMYf6a4.dpbs>

<sup>10</sup> *Constitution*: Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

<sup>11</sup> As the High Court’s Mason ACJ and Brennan J said, concerning definitions of religion, “canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” (*Scientology Case*, (1983) 154 CLR 120, 136.)



*Act*, such as the inquiry led by panel member Fr Frank Brennan recommended some years ago. This would ensure that the necessary balancing between freedom of religion or belief and the human rights and freedoms of others would be accomplished under the well understood principles of international human rights law, as in s.7(2) of the *Charter of Human Rights and Responsibilities* (Vic).<sup>12</sup>

3.1.5 It may be, indeed, as Matt Holden argues,<sup>13</sup> that even better is an evolution of society. The *Charter*, it is submitted, is a necessary step towards that society. Holden writes, “The best guarantee of religious freedom is a secular / pluralist society where people of all faiths – Judaism, Hinduism, Christianity, Islam, Buddhism, whatever – and people of no faith – are free to practice[sic] their beliefs collectively in churches, temples, mosques and synagogues, or in the privacy of their homes, and don't get to tell anyone else what to believe, or how to live.”

3.1.6 As many have pointed out, however, the same bodies that are now clamouring for new “protections” have previously been vehement opponents of moves to incorporate them in law, terrified apparently that what is sauce for the goose may be sauce for the gander too. Johnson and Maddox write:<sup>14</sup>

A striking feature of the debate has been the sudden enthusiasm for protecting religious freedom among those who were, until recently, committed opponents.

For years, conservative Christians campaigned against laws to protect religious freedom – because that would mean freedom for everyone. Time and again, what mattered to conservative Christians was “freedom to assert the superiority of their [own] belief system and the inferiority of others”.

In 1984, a landmark New South Wales Anti-Discrimination Board report recommended extensive protections for belief and practice. Exemplifying conservative Christian opposition, the Synod Standing Committee of the Anglican Diocese of Sydney declared itself “deeply disturbed” by the report’s “serious bias against mainstream Christian churches”.

In 1988, the federal government proposed widening Section 116’s religious freedom protections to apply to the states and territories. The Central Commission of the Australian Catholic Bishops’ Conference feared a US-style religion-state separation, threatening state aid to church schools. Some Anglican bishops foretold threats to religious instruction and prayer in public schools. Other Christian leaders warned of state-sanctioned stonings and female circumcision.

In 2005, the NSW Legislative Council debated the Anti-Discrimination Amendment (Religious Tolerance) Bill. The Christian Democrats thanked “thousands of Christians” for helping secure the bill’s defeat. The Sydney Diocese of the Anglican Church applauded.

In 2009, the federal government considered legislating a Charter of Rights. The inquiry, chaired by Jesuit priest Frank Brennan, recommended in favour, including “freedom from coercion or restraint in relation to religion and belief”. The Australian Christian Lobby led the opposition, supported by various church and Christian interest groups.

And now, in the marriage equality debate, those who fought against religious freedom protection are suddenly all for it.

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<sup>12</sup> This of course emphatically refutes the US claim that “religious freedoms” permit or “protect” the imposition of religious beliefs or practices on others of other or no faith group.

<sup>13</sup> Matt Holden, *SMH*, 14/9/2017, accessed 25/1/2018 at <http://www.smh.com.au/comment/the-best-guarantee-of-religious-freedom-is-keeping-religion-out-of-politics-20170914-gyhjt8.html>

<sup>14</sup> Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)



### 3.2 Undue privilege

3.2.1 For historical reasons Australian society, and law, have granted religions significant privileges in excess of what the doctrine of “freedom of religion” requires. Indeed since an essential element of that freedom is not preferring one belief system over another, it could be said that the practice of granting privileges to religious bodies violates the freedom of religion, because it discriminates against those who do not have a religion. This latter group—almost 30% saying “No Religion” (or 39.2% including those who did not claim any religion)—constitute the largest single category reported by the 2016 Census on the religion question, a proportion which has steadily grown over the years, and is now putting adherents of Roman Catholicism in second place.<sup>15</sup>

3.2.2 The unjustifiable privileges enjoyed by religious bodies are numerous. They include exemptions from ordinary laws, such as freedom from rates and taxes, a licence to discriminate on numerous (in some states all) attributes covered by anti-discrimination laws, and a freedom from scrutiny and accountability<sup>16</sup>. This latter freedom, as the Royal Commission has revealed,<sup>17</sup> enabled the rape of children and the covering up of such crimes with, even very recently, near impunity.

3.2.3 The existence of blasphemy laws is another example of unjustifiable privilege, whether they apply to one religion only or theistic beliefs in general: such laws, even if apparently fallen into desuetude, need to be repealed, and any rules of the common law prohibiting “blasphemy” or similar concepts must be abolished: see Appendix section 7, p14.<sup>18</sup>

3.2.4 These privileges should all be revoked. They are anachronistic. They are offensive to the rule of law, all notions of fairness, and growing public opinion.<sup>19</sup>

### 3.3 Support for change

3.3.1 Two important events in 2017 led to or demonstrated a significant change in public attitudes to religious freedom or privilege. The Royal Commission into Institutional Responses to Child Sexual Abuse revealed the horrifying extent of clerical, and particularly Roman Catholic, rape of and sexual assault upon young girls and boys, and the complicity of the hierarchy in protecting the child molesters, covering up the crimes and facilitating their continuation.

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<sup>15</sup> “The most common responses for religion in Australia were No Religion, so described 29.6%, Catholic 22.6%, Anglican 13.3%, Not stated 9.6% and Uniting Church 3.7%”  
ABS <http://www.censusdata.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter49802016>  
(accessed 19/1/2018)

<sup>16</sup> See, for example, Jane Lee, 8/12/2015, Police to apologise to detective over cover-up of child abuse investigation, *The Age* (accessed 11/2/2018 at <http://www.theage.com.au/victoria/police-to-apologise-to-detective-over-coverup-of-child-abuse-investigation-20151208-glidw9.html>):  
“Victoria Police will apologise and pay compensation to a former detective more than 30 years after senior officers covered up his investigation into child abuse allegations against a Catholic priest. The Royal Commission into Institutional Responses to Child Sexual Abuse on Tuesday heard from Denis Ryan, who had doggedly investigated allegations of child sexual abuse against Monsignor John Day in Mildura under intense pressure to stop. His superiors later took over the investigation and cleared Day of any wrongdoing. Police tried to force Mr Ryan to transfer to another station in 1972, and he ultimately resigned from the force.”

<sup>17</sup> *Ibid.*

<sup>18</sup> For a more detailed discussion see: Luke Beck, 19/6/2017, “Blasphemy is still a crime in Australia – and it shouldn't be” *The Conversation*, <https://theconversation.com/blasphemy-is-still-a-crime-in-australia-and-it-shouldnt-be-78990> (accessed 3/2/2018)

<sup>19</sup> Public opinion on tax exemptions is discussed below under the heading “Rates and taxes”.

3.3.2 Clearly, protecting the vulnerable from the predations of religious organisations was a more urgent concern of the public than merely theoretical, even fanciful, protection of “religious freedoms,” especially as campaigned on by those seeking a NO majority in the marriage equality postal survey.

3.3.3 The second event was that postal survey, and in particular the overwhelming 61.6% majority in favour of equality and thus, by the NO campaign’s own insistence, against the supposed need for greater “religious protections”.

3.3.4 In *The Meaning of YES... and NO*<sup>20</sup> it was argued:

The 61.6% YES margin revealed on 15 November 2017 was bigger than any federal election winner’s 2PP vote. ...There is a lot more to be gleaned from the success of the YES voters—“survey respondents”—than simply the command to Parliament to legislate for genuine marriage equality. Why? Because the NO campaign claimed time and again that the survey was about many things other than marriage equality, and the Australian people, by this emphatic majority, have rejected those claims, each and every one. ...

Right-wing NO warrior Tony Abbott announced that the vote was about more than marriage—and in stating as much he made it so.<sup>21</sup> ...[He] said: “If you’re worried about religious freedom ... vote no.” Other leaders of the NO campaign put other red herrings up [and] the people did indeed vote on those other things. They rejected, emphatically, ... the unwinding of anti-discrimination laws...

The people’s opinion empowers this Parliament, and future governments, to strengthen anti-discrimination laws, ... to curtail the unjustifiable special privileges of religious institutions to discriminate in the public sphere. Religious bodies must not be exempt from the ordinary laws, and the strong majority in this postal survey have clearly rejected their claim to such exemptions. This claim was perhaps the main plank of the NO campaign, and it was rejected. Emphatically.

3.3.5 The people’s emphatic rejection of the NO campaign’s claims, together with the shocking abuse revealed in the Royal Commission, and the consequent loss of public respect by religious institutions, together mark a shift in public opinion that can no longer be denied. This loss of respect is hardly new<sup>22</sup>, but it has acquired new urgency.

## **4 Intersections between human rights**

### **4.1 Schools**

4.1.1 A basic principle of the development of public schooling by governments across Australia in the 19<sup>th</sup> century was that it should be secular, universal and free. This remains the ideal, and the importance of education being secular is higher than ever. A secular education is one that does not proselytise one faith over another, or any religious faith at all. It was an essential compromise to avoid the ghettoization of

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<sup>20</sup> Gardiner, Jamie, 15 November 2017, “The Meaning of YES... and NO” (accessed 1/1/2018 at <http://www.powertopersuade.org.au/blog/the-meaning-of-yes-and-no/27/11/2017>); also (with minor variations) at <https://libertyvictoria.org.au/content/meaning-yes...and-no>  
See too: Edser, Dr Stuart, 10 December 2017, “When We Voted Yes, We Also Voted No,” Medium.com (<https://medium.com/@DrStuartEdser/when-we-voted-yes-we-also-voted-no-920fba9d20d8> accessed 1/1/18)

<sup>21</sup> Tony Abbott: “If you’re worried about religious freedom ... vote no” <https://www.theguardian.com/australia-news/2017/aug/09/abbott-says-vote-no-to-marriage-equality-and-stop-political-correctness-in-its-tracks> (accessed 15/11/2017)

<sup>22</sup> See, for example, Matt Wade, 12/10/2017, “Ipsos global poll: Two in three Australians think religion does more harm than good in the world” *Sydney Morning Herald*, <http://www.smh.com.au/national/ipsos-global-poll-two-in-three-australians-think-religion-does-more-harm-than-good-in-the-world-20171011-gyz7ii.html> (accessed 25/1/2018)

Australian society into competing and warring religious groups. Religions may of course enter into the curriculum in many ways, as religion has played a large, and often conflictual, part in history, literature and art—and even science. Understanding the many different religions that have existed, as well as the non-religious philosophies, and their interactions over time, is a proper study for all children. Indoctrination in any single faith, however, is antithetical to a healthy education, and a violation of the human rights of the child.<sup>23</sup>

4.1.2 In several States including until recently Victoria, the secular nature of public schooling has been often subverted by religious proselytising under the guise of Special Religious Instruction and similar names. Allowing privileged access to one religious body or another to proselytise children is a dangerous and divisive practice that must be stopped. The Royal Commission on Institutional Responses to Child Sexual Abuse has shown how unsafe children can be when entrusted to religious bodies, quite apart from the prejudicial content of the “instruction” itself.

4.1.3 On a larger scale still secular education is subverted by public funding for religious schools. This promotes sectarianism, and narrows the education of children in divisive ways, not to mention harming and bullying children who are of different or no faith, and children who are same sex attracted or gender diverse. While ideally such funding should be ceased, so long as it continues it should be a mandatory condition that children be taught about all religions, and non-religious ways of being, as described above, and that discrimination against both children and staff on the basis of sexual orientation, gender identity and intersex characteristics, as well as on the basis of religion, sex and relationship status, not be permitted.

## 4.2 Chaplains

4.2.1 The school chaplaincy program is an egregious example of the creeping overreach of religious privilege. Imposing religious officials on schools instead of professional counsellors, youth workers or psychologists as needed is a misuse of public moneys. It is unfortunate that when this program was challenged in the High Court the main issue, its blatant inconsistency with section 116 of the *Constitution* was not reached and so not ruled upon.

4.2.2 The chaplains program should be discontinued and the funds, perhaps increased even, re-allocated to providing professional assistance for students and staff by qualified youth workers, psychologists or counsellors.

## 4.3 Anti-discrimination law

4.3.1 A major area in which freedom of religion has been suborned by its transmutation into unjustifiable religious privilege is the granting of blanket exemptions to religious bodies and institutions. These effectively license them to discriminate on some or all attributes covered by modern anti-discrimination laws, rendering their protections ineffective for large portions of the workforce and the population.

4.3.2 Except for the training and appointment of religious officials such as pastors, imams, priests, bishops, rabbis, sheikhs and the like, and the conduct of religious rites and observances, these exemptions are an unacceptable violation of the human right to equality before the law and under the law. Exemptions which privilege religious bodies and beliefs over laws of general application—such as in the *Sex*

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<sup>23</sup> See, for example, articles 13 and 14 of the *Convention on the Rights of the Child* and related General Comments of the Treaty Committee.

*Discrimination Act 1984, the Disability Discrimination Act 1992 the Fair Work Act 2009 and the anti-discrimination laws of most states and territories, for starters—should be repealed entirely or, at the very least and as an interim measure only, firmly limited in application.*<sup>24</sup>

4.3.3 Equality is in fact at the heart of religious freedom, or religious tolerance as it was called in the nineteenth century, when still a very novel idea.

4.3.4 There are dozens of major religions in Australia, and the Australian Bureau of Statistics counts hundreds in total. Most believe they are privy to the One and Only Truth, and that the others and their gods are heretics, heathens, impostors or worse. One thing their leaders seem to agree on, however, for themselves and often for others, is that they are or should be above the law. In particular they seem to think—and have successfully lobbied governments for decades—that laws prohibiting discrimination should not apply to them. As Acting Chief Justice Mason and Justice Brennan said, however, in a High Court decision on what “religion” means in Australian law, “canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” (*Scientology Case*, (1983) 154 CLR 120, 136.) Discrimination today, unlike fifty years ago, does “offend against the ordinary laws.”

4.3.5 The Commonwealth Government has an opportunity this year, in this Religious Freedom Review, to revisit a great anomaly. This anomaly, found in every state but Tasmania, and in territory law as well as the Commonwealth *Sex and Age Discrimination Acts*, is the blanket “exemption” given to religious bodies. It places them effectively above the law.

4.3.6 Blanket exemptions are wrong. The human right to freedom of religion is not a peremptory norm of international law; it has the same status as other human rights. Like the human right to equality, it may be limited for legitimate purposes, by proportionate measures likely (on evidence) to be effective, and to the least extent possible. A blanket exemption for religious bodies imposes an unjustifiable limitation on the human right to equality.

4.3.7 While full repeal is desirable, some compromise may be possible in the interim. Bringing clarity, openness and transparency to the law may be sufficient.

4.3.8 Current laws give religious bodies, or “educational institutions established for religious purposes,” a licence to discriminate when to do so “conforms with” their “doctrines, tenets, beliefs or teachings,” or is “necessary to avoid injury to the religious susceptibilities of adherents of” the religion. The latter test in particular is impossibly vague, subjective and of uncertain meaning. This licence is not only unprincipled, it is neither clear nor transparent. But it could be made so.

4.3.9 Many religious bodies, moreover, wish neither to discriminate nor to be tarred with the same brush of bigotry that the loudest lobby calls for.

4.3.10 Legal clarity, openness and transparency, the reputations of fair-minded religious bodies, and the political realities can all be accommodated.

4.3.11 The key is to provide religious bodies the opportunity to claim a formal licence to discriminate, time-limited but renewable, conditional only on specifying precisely on what grounds and in which areas it is required, and in each case which

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<sup>24</sup> This and subsequent paragraphs in this section (4.3) are adapted from: Jamie Gardiner, “Equality and Religion” 20/1/2012, <http://www.equalitylaw.org.au/elrp-guest-blogs/equality-and-religion> accessed 5/1/2018

specific “doctrines, tenets, beliefs or teachings” necessitate it. The limits of the licence would thus be clear, and outside them ordinary law would apply.

4.3.12 For example, the claim might be that the employment of unmarried mothers as primary teachers violates particular religious tenets. Or the provision of accommodation to divorced persons or unmarried couples (mixed sex or same-sex, perhaps with different doctrinal particulars for each) is contrary to specified teachings.

4.3.13 The claim would be lodged with the Australian Human Rights Commission, in the case of Commonwealth laws, or the equivalent State or Territory bodies as required. It would be in writing and be displayed on the claimant religious body’s website and in other promotional material so that any potential employee, recipient of services or other person interacting with the body can be duly alerted to the body’s intended discrimination practices. A condition of the licence would be that the religious organisation “should also be required to detail the procedures with which they intend to invoke their exemption, and publicly report back to the relevant human rights body when they use their exemption.”<sup>25</sup> If it appears to the human rights body that the licence is being invoked in an arbitrary manner the licence can be revoked.

4.3.14 This process would apply to all attributes where a religious exemption currently exists, other than the primary exemption for employment and training of religious officials and the conduct of religious observance. It would not extend to attributes such as race and disability.

4.3.15 The licence to discriminate would (within its terms, and subject to the *bona fides* of the claimed justificatory doctrine) exempt the body from the operation of the law in question in relation to the specified conduct in its own activities with its own adult members and guests.

4.3.16 It will not, however, apply to anything done by the body in carrying out any activity or providing services funded in whole or in part by Commonwealth, State or local government, directly or through statutory authorities or other government-funded entities. Public funds should not be expended on supporting discriminatory activity. For the Commonwealth, giving financial support to religious bodies automatically goes against the spirit, and arguably the letter, of Section 116 of the *Constitution*, as it inevitably discriminates between those who hold, or do not hold, some religious or other beliefs.

4.3.17 The licence to discriminate will also not apply to permit discrimination against minors. They do not have legal capacity to assess the conditions represented by the licence and cannot give informed consent to them.

4.3.18 The default position must be to respect, protect and fulfil the human right to equality. To depart from that principled position is the exception requiring specific action.

#### 4.4 Rates and taxes

4.4.1 An aspect of “religious freedom” that increasingly<sup>26</sup> irks the Australian public is the freedom to pay no taxes. As Brian Morris writes in *The AIM Network*,<sup>27</sup>

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<sup>25</sup> Jim Woulfe, *Comment*, 20/1/2012, <http://www.equalitylaw.org.au/elrp-guest-blogs/equality-and-religion> accessed 5/1/18

<sup>26</sup> “The majority of Australians say church and state should be separate, yet religion continues to be privileged in our society at taxpayer expense,” Chris Fotinopoulos, 28/8/2013, “Religion



“Religion is a mega-billion-dollar entrepreneurial colossus that pays virtually no tax.” Citing an April 2016 national poll<sup>28</sup> he notes that “64 per cent of the community think religions should now be taxed” and “while two-thirds of the nation supported the notion of taxing religious businesses, only 7 per cent thought they should remain tax-exempt.”<sup>29</sup> Morris notes “disquiet with revelations from the Royal Commission into [Institutional Responses to] Child Sexual Abuse” and “the rank politicisation of religion across a raft of contemporary social issues” as being reasons for the strong disapproval of religions’ tax-exempt status. Another poll in the same month found even stronger opposition to this “religious freedom” to escape taxes.<sup>30</sup>

4.4.2 In 2008 a submission<sup>31</sup> to the Review of Australia’s Future Tax System attempted a comprehensive estimate of the cost to taxpayers of the tax-exempt status of religions, finding a figure of \$31bn a year. The submission notes:

More accurate estimates of this kind could be obtained if the information was available, but it is not. It is standard budgetary procedure that the loss of revenue arising from exemptions, for example those applying to superannuation pensions, are listed in budget papers and can be quantified. It is anomalous that no such requirement exists for religious organisations, even those that may be involved in significant business and investment related activities.

4.4.3 As a first step to reforming the anomalous privilege of tax-exempt status given to religious bodies, including business activities, it is essential that Commonwealth and State budgetary procedures be reformed to reveal accurately the revenue loss (or “tax expenditure”) involved.

## 4.5 Charities

4.5.1 A little over 400 years ago it may have made sense in Tudor England to consider “the advancement of religion” an inherently charitable purpose. It is utterly absurd in the 21<sup>st</sup> century. Yet this anomaly remains in our laws.

4.5.2 There are of course many valuable charities run under religious auspices. They derive their charitable aspect from the works they do, such as ministering to the sick or the poor, and many other contemporary roles of genuine public benefit. The advancement of religion, however, does not have that character. It is a reminder of an era when religion had official endorsement and commanded (albeit often unjustifiably) respect and deference. The Royal Commission has shown just how wrong society has been to accord religious bodies such deference and respect.

4.5.3 This archaic relic of another world must go. To begin with the *Charities Act* 2013 needs the following amendments:

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continues its free ride without our blessing” *ABC News* at [www.abc.net.au/news/2013-08-29/fotinopoulos-why-does-the...still.../4918626](http://www.abc.net.au/news/2013-08-29/fotinopoulos-why-does-the...still.../4918626)

<sup>27</sup> Brian Morris, “Why the public want religion to be taxed”, 6 May 2016, (<https://theaimn.com/public-want-religion-taxed/> accessed 4/1/18)

<sup>28</sup> *Essential Report*, 5/4/2016, <http://www.essentialvision.com.au/tax-on-religious-organisations> accessed 4/1/18

<sup>29</sup> With 64% in the *Essential Report* poll against tax exempt status for religions it is clear a substantial proportion of those who do themselves identify with a religion are nevertheless of this opinion.

<sup>30</sup> “A new poll by market research firm Ipsos has found that only 19.5 per cent of Australians are in favour of religious organizations having tax free status. The study asked if 'churches and other basic religious organisations should continue to have tax-exempt status to advance religion?' The answer was Yes = 19.5% No = 64% Maybe = 16.5%” *Rationalist Society*, 12/4/2016 at <https://www.rationalist.com.au/australians-against-giving-religions-tax-free-status/>

<sup>31</sup> [www.taxreview.treasury.gov.au/content/submissions/pre\\_14\\_november\\_2008-/Secular\\_Party\\_of\\_Australia.pdf](http://www.taxreview.treasury.gov.au/content/submissions/pre_14_november_2008-/Secular_Party_of_Australia.pdf) accessed 5/1/2018

- repeal subsection 12(1)(d) and thus remove from s.12 (Definition of *charitable purpose*) the words “(d) the purpose of advancing religion;”
- repeal subsection 7(e) and thus remove from s.7 (“Certain purposes presumed to be for the public benefit”) such a presumption in relation to “(e) the purpose of advancing religion”
- repeal subsection 10(2) to end the special privilege—not needing to be for the public benefit—which permits an entity to have the status of being a charity even though not being for public benefit “if the entity is a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public”.

4.5.4 Several other legal changes must follow in consequence. The *Australian Charities and Not-for-profits Commission Act 2012*, in particular, needs amendments to:

- repeal the “basic religious charity” concept (s.205-35), which removes governance and reporting standards from such entities
- repeal item 4 of the “Entitlement to registration” table in s.25-5(5), being the item referring to “advancement of religion” as a charitable purpose.

## Appendix

The submission of Liberty Victoria (submission 227, 28 June 2017) to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into *The status of the human right to freedom of religion or belief* concentrated mostly on the third Term of Reference of that inquiry, namely *The relationship between the freedom of religion or belief and other human rights, and the implications of constraints on the freedom of religion or belief for the enjoyment of other universal human rights*.

The present inquiry’s Objective and in particular paragraph 1 of the Scope covers essentially the same ground, and the present submission therefore includes the earlier one as an integral part of its response to the Freedom of Religion Review.